STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED July 7, 2005
v	No. 254365 Wayne Circuit Court
WILFER RUFF, Defendant-Appellee.	LC No. 03-003901-01

Before: Gage, P.J., and Whitbeck, C.J., and Saad, JJ.

PER CURIAM.

A jury convicted defendant of felon in possession of a firearm, MCL 750.224f, but the trial court entered a judgment of acquittal following defendant's motion for judgment notwithstanding the verdict (JNOV). The prosecutor appeals the trial court's decision, and we reverse.

On February 6, 2003, defendant was driving in the Highland Park area when Michigan State Police Officers signaled him to pull over for equipment violations. Before he stopped, the officers saw defendant reach toward the back seat of the vehicle "several" times. During the stop, defendant failed to produce a driver's license and the officers placed him under arrest, searched the car, and found a half-full pint of gin and a loaded handgun. The gun was located inside the folding armrest in the center of the back seat of the car.

In addition to the felon in possession charge, the prosecutor charged defendant with carrying a concealed weapon, MCL 750.227(2), and possession of a firearm during the commission of a felony, MCL 750.227b. At trial, to counter evidence that the officers saw defendant repeatedly reach toward the back seat, defendant testified that he did not own the gun and that he did not know it was in the car. The jury found defendant not guilty of carrying a concealed weapon and felony-firearm, but found him guilty of felon in possession of a firearm.

Though defense counsel stipulated to the jury instructions to be read at trial, after defendant's conviction, he filed a motion for JNOV and argued that the jury instruction for felon in possession is vague. Specifically, defendant maintained that the instruction, CJI2d 11.38a,[1]

[1] CJI2d 11.38a mirrors the felon in possession statute, MCL 750.224f. The statute provides:

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should have included an element that defendant had to have *knowingly* possessed or transported the firearm. According to defendant, had the instruction contained the element of knowledge, he would have been acquitted of all three firearms charges. The trial court agreed with defendant and ruled that the jury instruction is "deficient," "vague," and should be rewritten to include a knowledge element. The trial judge then entered a judgment of acquittal on the felon in possession charge.

We hold that the trial court erred by overturning the jury's verdict and entering a judgment of acquittal because defendant affirmatively waived his objections to the jury instructions by stipulating to the specific, standard jury instruction he now challenges.

"To preserve an instructional error for review, a defendant must object to the instruction before the jury deliberates." *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003), citing MCR 2.515(C). The failure to make a timely objection to a jury instruction constitutes forfeiture and relief is only warranted if the error was plain and it affected the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). In contrast, if a party expresses satisfaction with the trial court's instructions, it constitutes a waiver that extinguishes any error regarding the instructions. *People v Carter*, 462 Mich 206, 215; 612

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> (1) Except as provided in subsection (2), a person convicted of a felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state until the expiration of 3 years after all of the following circumstances exist:
>
> (a) The person has paid all fines imposed for the violation.
>
> (b) The person has served all terms of imprisonment imposed for the violation.
>
> (c) The person has successfully completed all conditions of probation or parole imposed for the violation.

The standard jury instruction, CJI2d 11.38a, provides:

> The defendant is charged with having [possessed / used / transported / sold / received] a firearm in this state after having been convicted of a specified felony. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> (1) First, that the defendant [possessed / used / transported / sold / received] a firearm in this state.
>
> (2) Second, that the defendant was convicted of [name specified felony].
>
> (3) Third, that less than 5 years had passed since [all fines were paid / all imprisonment was served / all terms of probation were completed].

Defendant does not allege that the trial court misread the instruction. Further, defendant stipulated to his commission of a specified felony and that less than five years had passed since the terms of his probation were completed.

NW2d 144 (2000). Here, defense counsel went beyond a mere declaration of his satisfaction with the jury instructions read by the trial court. Indeed, before they were read to the jury, defense counsel consulted with the prosecutor and stipulated to a list of jury instructions that specifically included CJI2d 11.38a. Further, defense counsel acknowledged on the record that he agreed to the instructions and also consented to the written instructions given to the jurors during their deliberations. This falls under the "invited error" doctrine, explained by our Supreme Court in *People v Jones*, 468 Mich 345, 352 n 6; 662 NW2d 376 (2003):

> "Invited error" is typically said to occur when a party's own affirmative conduct directly causes the error. For example, in *Vannoy v City of Warren*, 386 Mich 686, 690, 194 NW2d 304 (1972), this Court explained that a party cannot seek appellate review of an instruction that he himself requested, saying, "Assuming error as claimed, that error comes within the purview of what of tradition and common sense is known as 'invited error.' " Appellate review is precluded because when a party invites the error, he waives his right to seek appellate review, and any error is extinguished.

Here, the alleged error was directly attributable to the affirmative conduct of defense counsel, who expressed a clear intention to rely on the very jury instruction he challenged after the verdict. Thus, he affirmatively and unequivocally waived any dispute with regard to the standard instruction and extinguished any error.[2] Because there was no error to correct, the trial court erroneously granted defendant's request for relief. *Carter, supra*.[3]

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[2] Defendant does not allege that defense counsel was ineffective for the way he handled the jury instructions at trial.

[3] Moreover, were there an error to correct, which we hold there was not because any allegation of error was extinguished by defense counsel, the relief granted by the trial court was erroneous. Defendant moved for JNOV which, in criminal proceedings, is a directed verdict of acquittal after a jury verdict, MCR 6.419(B). In its order, the trial court indicated that the acquittal was entered pursuant to a motion for JNOV. However, if a verdict is overturned because of instructional error, the remedy is retrial, not acquittal. See *People v Lynn*, 459 Mich 53, 57-58; 586 NW2d 534 (1998).

In order to justify an *acquittal* under the criminal court rules, the trial court would have to have found that, viewing the evidence in a light most favorable to the prosecutor, the essential elements of the crime were not proved beyond a reasonable doubt. *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001). A de novo review of the record shows that two police officers saw defendant repeatedly reach toward the back seat of the car, where the firearm was ultimately found. *People v Werner*, 254 Mich App 528, 530; 659 NW2d 688 (2003); see also *Schultz, supra* at 702. "Circumstantial evidence and reasonable inferences arising therefrom can sufficiently establish the elements of a crime." *Schultz, supra* at 702. Based on this evidence, the jury was free to infer possession or transport of the gun because the officers saw defendant reach into the back seat several times while they pursued him. Indeed, earlier in the trial, the court denied defendant's motion for a directed verdict based on this very evidence.

Furthermore, to the extent the court may have premised its decision on a finding that the

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Reversed.

/s/ Hilda R. Gage
/s/ William C. Whitbeck
/s/ Henry William Saad

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jury's verdicts were inconsistent, the entry of an acquittal was, once again, erroneous. "That the verdict may have been the result of compromise, or of a mistake on the part of the jury is possible. But verdicts cannot be upset by speculation or inquiry into such matters." *People v Cazal*, 412 Mich 680, 688; 316 NW2d 705 (1982) (internal quotation marks and citations omitted). Instead, the correct inquiry is whether the verdict upon which the jury did agree is supported by the evidence. *Id*. As explained above, evidence supported the jury's guilty verdict on the felon in possession charge and the entry of an acquittal was clearly erroneous.

Finally, were we to ignore that defendant affirmatively waived and extinguished any error regarding the jury instruction, he would not prevail on review under the plain error doctrine because the error was not plain, clear, or obvious and, even under defendant's reading of the felon in possession statute, ample evidence supported his conviction. *Jones, supra* at 355; *Carines, supra* at 763.